BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

JACOB N. WYATT	)	
Claimant	)	
V.	)	
	)	
DR. PEPPER-SEVEN UP BOTTLING	)	Docket No. 1,067,975
Respondent	)	
AND	)	
	)	
NEW HAMPSHIRE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Claimant, through Jeffrey K. Cooper and Carl J. Snider, requested review of Administrative Law Judge Steven Roth's November 13, 2015 Award.[1] Gregory Worth appeared for respondent and insurance carrier (respondent). The Board heard oral argument on March 15, 2016.

RECORD AND STIPULATIONS

The Board has adopted the stipulations listed in the Award and considered the record, including two transcripts not listed in the Award – the February 25, 2014 preliminary hearing transcript and the June 5, 2014 penalties motion hearing transcript. At oral argument, the parties stipulated that the exhibits at the aforementioned two hearings are not part of the record. The parties also stipulated the Board may independently consult the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.) (hereafter *Guides*) in rendering an opinion.

ISSUES

Adopting a rating from Zhengyu Hu, M.D., the judge found claimant sustained a 2.5% whole body impairment for a November 12, 2013 injury by accident, but denied future medical treatment and unauthorized medical treatment.

Claimant argues the more credible evidence comes from Pedro Murati, M.D. Claimant asserts Dr. Murati's 3% whole body rating was based on strict application of the *Guides* and provides a clear explanation regarding claimant's need for future medical treatment. Additionally, claimant requests payment of unauthorized medical which he states was not addressed by the judge.

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[1] An Award Nunc Pro Tunc was entered on Nov. 23, 2015, correcting mathematical errors regarding the weekly benefit rate, the weeks payable for permanent partial disability benefits and the amount of the resulting Award. For whatever reason, the Award Nunc Pro Tunc was not contained in the record on appeal.

Respondent maintains the Award should be affirmed. Respondent asserts Dr. Hu's rating is more credible because he was claimant's treating physician. Additionally, respondent argues while claimant is concerned about a possible return of his symptoms, he did not prove he will more probably than not need future medical treatment, noting claimant has not required medical treatment after being released by Dr. Hu.

The issues are: (1) what is the nature and extent of claimant's disability; (2) is claimant entitled to future medical treatment; and (3) is claimant entitled to unauthorized medical?

FINDINGS OF FACT

Claimant, 34 years old, began working for respondent in October 2013, as a delivery driver/merchandiser. On November 12, 2013, claimant was unloading a pack of eight two-liter bottles onto a pallet when he felt a tearing, sharp pain and cramping in his right chest, upper abdomen and ribs, between his pectoral muscle and his stomach, and more specifically four inches below and two inches right of his right nipple.

Respondent referred claimant for medical treatment with the company doctor and he was placed on light duty. Respondent was unable to accommodate such restrictions and claimant did not return to work until January 8, 2014, when his restrictions changed. After working an eight-hour shift that day, claimant was in severe pain and told his supervisor he was hurting. According to claimant, he was told to return to the company doctor and obtain something in writing. Claimant did not obtain anything from the company doctor and respondent terminated his employment on January 24, 2014.

At his attorney's request, Pedro Murati, M.D., who is board certified in physical medicine, rehabilitation, electrodiagnosis and independent medical evaluations, saw claimant on January 14, 2014. Claimant complained of chest pain when lifting, driving or sitting longer than 20 minutes. Dr. Murati diagnosed claimant with right costochondritis and recommended injections and wrapping claimant's ribs. Dr. Murati opined claimant's accident was the prevailing factor causing his injury, medical condition and need for medical treatment.

Zhengyu Hu, M.D., who is board certified in physical medicine rehabilitation and pain management, was claimant's authorized treating physician. Dr. Hu started treating claimant on May 6, 2014. The physician's initial examination prompted complaints of tenderness to the front and back of claimant's ribcage, with more posterior pain than anterior pain. Dr. Hu diagnosed claimant with right rib cage pain without fracture. Dr. Hu prescribed medication (pills and gels) and administered two sets of intercostal nerve blocks on June 10 (to T8-10) and July 1, 2014 (to T5-7), a total of six injections. On July 15, 2014, claimant told Dr. Hu that the second set of injections greatly improved his pain to the point it was almost gone and claimant stopped taking oral medication.

Dr. Hu also had claimant complete work hardening because claimant was concerned about his strength. Claimant told Dr. Hu the work hardening increased his pain. Dr. Hu responded by prescribing lidocaine gel, in addition to the already-prescribed medication. On November 10, 2014, Dr. Hu noted claimant had intermittent pain after completing work hardening. Dr. Hu released claimant from treatment without work restrictions. Prior to such time, the doctor precluded claimant from lifting over 15 pounds. Dr. Hu testified future medical treatment as of November 10, 2014, was "[n]ot planned."[2]

Claimant testified his pain initially was alleviated following the second set of injections, but his pain returned and continued throughout work hardening. However, claimant testified his "pain went away"[3] after he stopped work hardening. According to claimant, he was told that if his pain returned, he should "come back in and have another shot."[4] Further, claimant stated he and Dr. Hu discussed future medical treatment at their last appointment.[5] Claimant testified Dr. Hu told him he could come back if he was having more symptoms and wanted more treatment. At odds with this testimony, claimant also noted Dr. Hu did not tell him to come back if he was having more problems.[6]

Dr. Hu indicated nerve blocks usually only help one to six months. Because claimant had not contacted Dr. Hu since he was released on November 10, 2014, the doctor opined claimant will "[p]robably not"[7] require future medical treatment. Dr. Hu denied discussing future medical treatment with claimant at their last visit and they had no such discussions at all. Dr. Hu also stated it was his recollection he never told claimant he would be a candidate for additional injections if he had more pain, but he acknowledged they last met about 11 months prior to Dr. Hu's October 13, 2015 deposition and he could not remember everything. The doctor also noted he usually would include things he tells patients, such as future medical needs, in his notes. Dr. Hu indicated if claimant has recurrent and severe pain, it would be good to repeat one time the same course of treatment that was previously successful. Dr. Hu also testified providing claimant another injection would be theoretically "reasonable"[8] assuming claimant had more pain and requested treatment.

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[2] Hu Depo. at 14.

[3] R.H. Trans. at 9.

[4] *Id*. at 9.

[5] *Id*. at 12, 15.

[6] *Id*. at 16.

[7] Hu Depo. at 14.

[8] *Id*. at 21-22.

In a rating report, Dr. Hu provided claimant a 2.5% whole person impairment based on Lumbosacral DRE Category II of the *Guides*. When asked how he arrived at the rating, Dr. Hu testified:

> I think that's a soft call because the DRE category two you have some more objective findings. The criteria is variable. We can look at the book and we can go by the - - what is specifically the qualifier for the DRE category two, so I think it's reasonable to give him between the DRE category one, which is zero percent, and the category two, which is the five percent. That's why I chose 2.5.[9]

At his attorney's request, claimant returned to Dr. Murati on January 13, 2015. Claimant complained of minor chest cramps after prolonged sitting. Dr. Murati assigned claimant a 3% whole body impairment, using the Pain Chapter 15, page 303, of the *Guides*. In his report, Dr. Murati recommended "at least yearly follow ups on his chest in case of any complications that may ensue"[10] and gave claimant permanent restrictions of lifting up to 50 pounds occasionally and 35 pounds frequently, in addition to climbing ladders and crawling on an occasional basis. Dr. Murati testified claimant's accident caused him to have a weakened costochondral junction, a chronic condition, and claimant will more likely than not experience flare-ups in the future and will "more probably" than not require ongoing medical care, including additional injections and medication, unless claimant leads a completely sedentary lifestyle.[11]

Claimant testified he has not taken any pain medication after last receiving treatment on or around November 10, 2014, even though he still has pills that Dr. Hu prescribed. Claimant received unemployment benefits for six months after Dr. Hu released him. He does not experience pain every time he performs strenuous work, but has pain when climbing ladders or doing yard work. Claimant testified when he has pain, he simply stops doing the activity to avoid having "pain that often or that long."[12] Claimant performed strenuous work for a former employer for 22 hours over two days and he had "a lot of discomfort and pain" after doing significant bending and lifting. His pain did not continue thereafter. Claimant has not worked anywhere subsequent to January 24, 2014, other than mowing his father's lawn for $40 a week. Claimant is looking for work, but he is concerned about possibly having additional symptoms if he tries to work a 40-hour week, not being able to obtain quick treatment and not being able to do any future job duties.

In the November 13, 2015 Award, the judge stated:

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[9] *Id*. at 20-21.

[10] Murati Depo., Ex. 3 at 2.

[11] *Id*. at 11, see also pp. 13-16.

[12] R.H. Trans. at 17.

What is the nature and extent of claimant's disability?

Answer: 2.5 % permanent partial impairment to the body as a whole.

The difference between the two ratings of two qualified physicians is on[ly] ½ of one percent. While the AMA guides make every attempt to provide objective findings, some subjectivity is inherent. (Hu p. 20) After a review of all the medical reports and depositions in evidence the Court's determination falls in favor of Dr. Hu as he has been Claimant['s . . . treating physician over an extended period of time - - May 6 to November 10, 2014. (Hu, p. 8, 13). The Court perceives this longer history a small but significant advantage that tips in Dr. Hu's favor and against Dr. Murati as his role has been more limited. (Murati, p. 5)

Is Claimant entitled to unauthorized and future medical compensation?

Answer: No

. . .

Claimant's diagnos[i]s is right Costochondritis[.] (Murati exhibit 3, p. 2) [T]his condition was best described by Dr. Murati:

> . . . Right where the rib ends - - right where the bone ends and the cartilage starts, that's the junction, which is the weakest point of the chain. So if it's going to break, it's going to break there. I mean, you can have rib fractures, too, but usually that's where it breaks if you are going to get the costochondritis. (Murati, p. 7)

As painful as such a condition may be upon injury, and as long as some symptoms might persist after injury, what is basically being described are bruised ribs. (Hu, p. 7)

Of all the evidence Claimant has presented to support the need of future medical, Claimant's strongest points are as follows:

> 1. The findings of Dr. Murati that should Claimant experience flare ups of pain he may need anti-inflammatory medications or other like treatments. (Murati, p. 10)
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> 2. Dr. Murati recommends Claimant address any physical concerns he may have over this injury with yearly medical check ups (Murati exhibit 3)
>
> 3. Claimant has experienced discomfort and pain when he worked for two days for his employer last spring or performs other occasional exertions. (Reg. Hrg. p 9, 17)

Evidence presented in an attempt to rebut the need for future medical is as follows:

1. Claimants Costochondritis, though chronic, is subject to possible improvement over time. (Murati, p. 15)

2. There is no medical evidence of bone fracture or other significant injury suffered. (Hu, p.7)

3. A common, physical treatment for costochondritis is to use an ace bandage or athletic tape around the ribs. (Murati exhibit 2, p.3)

4. Claimant was prescribed oral medication, primarily for pain but has not always needed it as evidenced by his choice to stop using it. (Hu, p.11,12)

5. Claimant participated in a work hardening program and despite initial difficulties, at the conclusion experienced no pain (Reg. Hrg. P. 8,9)

6. Claimant has sought and received two different injections to assist with pain. The last of these were given in July, 2014. Since then it is reported that his rib cage pain is almost gone. (Hu, p. 10)

7. Claimant has, at times since being released from care, performed strenuous work without experience pain. (Reg. Hrg. p. 15)

8. Dr. Hu, the most recent treating physician, when asked about the need of future medical opined Claimant would "probably not" need such future care. (Hu p. 14)

9. Claimant understands that he was released from Dr. Hu in November 10, 201[4] without restrictions (Reg. Hrg. p. 16)

In weighing both sides of this issue and the evidence supporting future medical is greatly weakened by the following:

- Despite Dr. Murati's concerns about flare ups of pain, since claimant[']s release from treatment he has apparently not experienced pain to the degree that he has sought out significant medical treatment in what now has been nearly a year.

- Occasionally, Claimant does complain of experiencing sporadic pain when exerting himself. Climbing ladders, weed eating or carrying buckets are examples of activities that can give him problems. However, other types of rigorous activities do not seem to bother him. Claimant states that if he stops doing those activities that hurt, the pain stops, apparently on its own. (Reg. Hrg. p.17)

- Annual physical check-ups are a laudable practice for everyone regardless of the condition of their health. Dr. Murati's recommendation for annual check-up lacks a compelling argument that claimant's injury makes his situation unique.

All the above considered, this Court finds that Claimant has not, despite an admirable and valiant attempt on the part of his attorney, provided sufficient evidence of an award for future medical. Future medical is denied.[13]

The Award also denied claimant unauthorized medical. Claimant appealed.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-501b(b) states an employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment. According to K.S.A. 2013 Supp. 44-501b(c), the burden of proof shall be on the claimant to establish his or her right to an award of compensation and the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508 provides, in part:

> (h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.
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> . . .
>
> (u) "Functional impairment" means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American medical association guides to the evaluation of impairment, if the impairment is contained therein.[14]

However, if a claimant's impairment is not covered in the *Guides*, a doctor may use his or her own judgment to assess a claimant's impairment.[15]

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[13] ALJ Award at 3-5.

[14] K.S.A. 2013 Supp. 44-510d(b)(23) and K.S.A. 2013 Supp. 44-510e(a)(2)(B) also state impairment for injuries are to be "determined using the fourth edition of the American medical association guides to the evaluation of permanent impairment, if the impairment is contained therein."

[15] K.S.A. 44-510e(a); See *Smith v. Sophie's Catering & Deli Inc.*, No. 99,713, 2009 WL 596551 (Kansas Court of Appeals unpublished opinion filed Mar. 6, 2009), *publication denied* Nov. 5, 2010, and *Kinser v. Topeka Tree Care, Inc.*, No. 1,014,332, 2006 WL 2632002 (Kan. WCAB Aug. 1, 2006).

K.S.A. 2013 Supp. 44-510h states, in part:

> (a) It shall be the duty of the employer to provide [medical] treatment, . . . as may be reasonably necessary to cure and relieve the employee from the effects of the injury.
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> . . .
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> (b)(2) Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of $500.
>
> . . .
>
> (e) It is presumed that the employer's obligation to provide the services of a health care provider . . . shall terminate upon the employee reaching maximum medical improvement. Such presumption may be overcome with medical evidence that it is more probably true than not that additional medical treatment will be necessary after such time as the employee reaches maximum medical improvement.

Board review of a judge's order is de novo on the record.[16] The Board, on de novo review, makes its own factual findings.[17] The Board is as equally capable as a judge in reviewing the evidence.[18]

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[19] The trier of fact must decide the nature and extent of injury and which testimony is more accurate and/or credible and may adjust the medical testimony (without being bound by the medical evidence) with the testimony of claimant and any other testimony relevant to the issue of disability.[20]

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[16] See *Helms v. Pendergast*, 21 Kan. App. 2d 303, 899 P.2d 501 (1995). The definition of a de novo hearing is a decision of the matter anew, giving no deference to findings and conclusions previously made by the judge. See *In re Tax Appeal of Colorado Interstate Gas Co.*, 270 Kan. 303, 14 P.3d 1099 (2000).

[17] See *Berberich v. U.S.D. 609 S.E. Ks. Reg'l Educ. Ctr.*, No. 97,463, 2007 WL 3341766 (Kansas Court of Appeals unpublished opinion filed Nov. 9, 2007).

[18] See *Moore v. Venture Corp.*, 51 Kan. App. 2d 132, 343 P.3d 114 (2015).

[19] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[20] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, Syl. ¶ 1, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991), *superseded on other grounds by statute* (The trier of fact is "free to consider all of the evidence and decide for itself the percentage of disability. The numbers testified to by the physicians are not absolutely controlling.").

ANALYSIS

1. Claimant has a 2.75% impairment to the body as a whole.

The Board cannot locate a specific section in the *Guides* regarding how to calculate a chest wall, rib cage or costochondral impairment. Therefore, a doctor may use his or her judgment to formulate a rating.

There are potential problems with both ratings. Both ratings are subjective and arbitrary estimates. Dr. Hu's rating is somewhat based on, or perhaps extrapolated from, lumbar spine ratings contained in the *Guides*. While claimant had front and back rib pain, according to Dr. Hu, claimant does not have a lumbar spine or low back injury. Issuing a rating for a rib injury using a back rating system seems peculiar, but it is allowed, because the *Guides* do not directly address claimant's impairment. Also, Dr. Hu acknowledged his rating is a "soft call," but that is also allowed where no corresponding rating is readily identifiable under the *Guides*.

Dr. Murati's rating is derived from the *Guides,* which recognize pain can be an impairment as based on "the physician's training, experience, skill, . . . thoroughness [and] judgment."[21] However, the *Guides* observe that pain is subjective and immeasurable, often viewed with "suspicion and disbelief."[22] The concept of impairment due to pain is "problematic as well as controversial."[23] The *Guides* do not contain numerical values for ratings in the Pain Chapter, so a rating would be based on physician judgment. In any event, as with Dr. Hu, Dr. Murati's rating is in accord with Kansas law only requiring use of the *Guides* for impairment contained therein.

Both ratings are equally credible. The Board concludes claimant has a 2.75% impairment to the body as a whole.

2. Claimant is not entitled to future medical treatment.

Dr. Murati's opinion regarding future medical treatment is speculative. His written opinion only suggests future medical treatment "in case of any complications that may ensue." Such opinion is inherently speculative and at odds with his testimony that claimant would require future medical treatment.

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[21] *Guides* at 304.

[22] *Id*. at 303.

[23] *Id.* While only applicable to injuries occurring on and after January 1, 2015, and therefore irrelevant to this claim, the AMA *Guides to the Evaluation of Permanent Impairment* (6th Ed.) allows a 0-3% whole body rating for pain (no pain and mild pain = no impairment, moderate pain = 1% impairment, severe pain = 2% impairment and extreme pain = 3% impairment).

Dr. Hu testified claimant will "probably not"[24] require future medical treatment, but he could repeat his treatment regimen if claimant had recurrent and severe pain. Dr. Hu's testimony that claimant might have recurrent and severe pain is speculative and does not meet the more probably true than not burden of proof. In fact, claimant has not had the recurrent and severe pain that could conceivably justify additional medical treatment, further undercutting his argument he should be entitled to future medical treatment.

Claimant's testimony that he is concerned about the possibility of pain in the future or not being able to work a 40-hour work week is not "medical evidence" as defined by K.S.A. 2013 Supp. 44-510h(e).

The Board adopts the detailed findings and conclusions of the judge regarding the denial of future medical treatment for claimant, as cited in pages 5-7 of this Order.

3. Claimant is entitled to payment of unauthorized medical, if not already paid.

On January 14, 2014, Dr. Murati evaluated claimant for the purpose of examination, diagnosis or treatment. Respondent is liable for the fees and charges of such health care provider up to a total amount of $500, if not already paid.

CONCLUSIONS

1. Claimant sustained a 2.75% impairment of function due to his injury by accident.

2. Claimant is not entitled to future medical treatment.

3. Claimant is entitled to payment of up to $500 in unauthorized medical, if not already paid.

AWARD

WHEREFORE, the Board modifies the November 13, 2015 Award to reflect claimant has a 2.75% impairment and claimant is entitled to up to $500 in unauthorized medical, if not already paid. Otherwise, the Award is affirmed.

Claimant is entitled to 54 weeks of temporary total disability compensation at the rate of $456.34 per week or $24,642.36 followed by 10.34 weeks of permanent partial disability compensation at the rate of $456.34 per week or $4,718.56 for a 2.75% whole body functional impairment, making a total award of $29,360.92, all due and owing less amounts previously paid.

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[24] Hu Depo. at 14.

IT IS SO ORDERED.

Dated this _____ day of March, 2016.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

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